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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

GABRIEL AGUAYO,

Defendant and Appellant.

E071754

(Super.Ct.No. FSB026475)

OPINION

APPEAL from the Superior Court of San Bernardino County. William Jefferson Powell IV, Judge. Affirmed.

Gabriel Aguayo, in pro. per.; and Kenneth H. Nordin, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

## **FACTUAL AND PROCEDURAL HISTORY**

On October 29, 2018, defendant and appellant Gabriel Aguayo filed a petition for resentencing under Penal Code section 1170.126<sup>1</sup>. The petition and the attached exhibits showed that defendant was serving (1) 25 years to life on count 5, assault with a firearm under section 245, subdivision (a)(2), with a 10-year enhancement for personal use of a firearm under section 12022.5, subdivision (a)(1); and (2) 25 years to life on count 6, possession of a firearm by a felon under former section 12021, subdivision (a)(1). Pursuant to section 654, defendant's sentence on count 6 was stayed. Moreover, defendant was servicing an additional five years for a prior serious felony pursuant to section 667, subdivision (a)(1). Furthermore, two one-year enhancements for prior prison terms within the meaning of section 667.5, subdivision (b), were imposed. Therefore, defendant was sentenced to a total indeterminate prison term of 42 years to life.

In Appendix F to the petition for resentencing, defendant waived his right to appear at the court proceedings held in connection with his petition for resentencing.

On November 7, 2018, the trial court denied defendant's petition.

On November 20, 2018, defendant filed a timely notice of appeal.

## **DISCUSSION**

After defendant appealed, and upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 setting forth a statement of

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

the case, a summary of the facts, and potential arguable issues, and requesting this court to undertake a review of the entire record.

We offered defendant an opportunity to file a personal supplemental brief. On March 1, 2019, defendant filed a four-page typewritten supplemental brief. In his brief, defendant appears to argue that (1) his counsel rendered ineffective assistance of counsel (IAC) by filing a *Wende* brief; and (2) the trial court abused its discretion in denying his petition.

First, in order to establish a claim of IAC, defendant must demonstrate, “(1) counsel’s performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient representation prejudiced the defendant, i.e., there is a ‘reasonable probability’ that, but for counsel’s failings, defendant would have obtained a more favorable result. [Citations.] A ‘reasonable probability’ is one that is enough to undermine confidence in the outcome.” (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541, citing, among other cases, *Strickland v. Washington* (1984) 466 U.S. 668; accord, *People v. Boyette* (2002) 29 Cal.4th 381, 430.) Hence, an IAC claim has two components: deficient performance and prejudice. (*Strickland*, at pp. 687-688, 693-694; *People v. Williams* (1997) 16 Cal.4th 153, 214-215; *People v. Davis* (1995) 10 Cal.4th 463, 503; *People v. Ledesma* (1987) 43 Cal.3d 171, 217, 233.) If a defendant fails to establish either component, his claim fails. In this case, defendant essentially argues that counsel provided IAC for filing a *Wende* brief. Defendant’s argument is without merit because under the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we must independently review the record for potential error.

Simply filing a *Wende* brief does not deem a counsel's performance as ineffective. We have examined the entire record and are satisfied that no arguable issues exist, and that defendant has, by virtue of counsel's compliance with the *Wende* procedure and our review of the record, received adequate and effective appellate review of the judgment entered against him in this case.

Second, although defendant contends that the "trial court abused its judicial discretion when it denied appellant's petition for resentencing without reason on November 6, 2018[,]" defendant has failed to provide any legal authority or argument to support this contention. Instead, it appears that defendant is arguing that the trial court abused its discretion in imposing a sentence under section 12022.5 in the original sentence: "The trial court abused its judicial discretion when it denied appellant's petition for resentencing. As the trial records support that neither the original complaint (of May 9, 2000) nor the second (amended) complaint (of July 18, 2000) have any charged/allegation of P.C. § 12022.5—of which the trial court imposed an enhancement for, resulting in an illegal and prejudicial sentence." This appeal, however, is not from the original sentencing imposed in 2001. As defendant's notice of appeal states, this appeal is from his petition for resentencing. It is not an appeal from his original conviction and sentence.

We have independently reviewed the record for potential error and find no error.

**DISPOSITION**

The judgment is affirmed.

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MILLER  
J.

We concur:

McKINSTER  
Acting P. J.

RAPHAEL  
J.